IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 10-0326

JOHN FITZGERALD,

Petitioner,

v.

MISSOULA COUNTY JUSTICE COURT,
THE HONORABLE KAREN A. ORZECH,

Respondent.

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF SUPERVISORY CONTROL

APPEARANCES:

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STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF SUPERVISORY CONTROL

The State respectfully submits the following response to the Defendant, John Fitzgerald's, Petition For a Writ Of Supervisory Control.

BACKGROUND

John Fitzgerald was charged with a second offense DUI and driving without headlights in Missoula County Justice Court on May 25, 2009, and trial was set for September 25, 2009. The original citation issued by the arresting officer specified the location of the offenses as Mullan and Reserve Streets in Missoula and specified that Fitzgerald was driving a white Chevrolet van. The arresting officer's report, provided to the Defense in discovery, likewise described the incident as occurring at Mullan and Reserve Streets and stated that Fitzgerald had been driving a white Chevrolet van. Finally,

Fitzgerald's attorney had interviewed the arresting officer who described the events as having happened at Reserve and Mullan Streets and described the vehicle as a white van.

On or about August 21st, 2009, the State received Fitzgerald's driving record and discovered that his prior DUI conviction had occurred over five years previous to the current offense. Therefore, the State filed an Amended Complaint which amended the DUI charge to a first offense. Counsel for the State at the time apparently referenced the wrong report in preparing the Amended Complaint and put the wrong streets and vehicle in the Amended Complaint. This error was discovered on the eve of trial.

The State filed a Second Amended Complaint before trial to correct the error which improperly identified the make and model of the Fitzgerald's vehicle and the intersection where he was stopped. Fitzgerald claimed unfair surprise and opposed the late filing of the Second Amended Complaint. The State was permitted to file the Second Amended Complaint. The Court offered to allow Fitzgerald to continue the trial if he wished to have additional time to prepare. Fitzgerald moved to continue the trial date based on his inability to proceed under the facts contained in the Second Amended Complaint. The motion was granted. A hearing was set for the purpose of scheduling a new trial.

On October 8th, 2009, Fitzgerald appeared with counsel and stated that a new trial date should not be set and that he intended to file a Writ of Mandamus with the District Court regarding the untimely filing of the Second Amended Complaint. Fitzgerald did in fact file such a Writ and then repeatedly continued proceedings in Justice Court while awaiting a ruling from District Court.

The case was then delayed for nearly seven months while both parties awaited a decision on the Defense's Writ of Mandamus from the District Court. The District Court denied the writ on May 5, 2010, and the State again prepared to proceed in Justice Court. A new trial date was set for June 9, 2010. The Defendant filed a Motion to Dismiss for lack of speedy trial on May 17, 2010. That Motion was denied.

SUMMARY OF REASONS FOR DENYING A WRIT

A claim that a defendant's right to a speedy trial has been violated is not properly reviewed in a Writ of Supervisory Control. Furthermore, Fitzgerald's argument fails on the merits because a defendant cannot both seek to cause extensive delay and then have his case dismissed because of that delay. Fitzgerald specifically sought to delay the trial in this case while he awaiting ruling on a Writ of Mandamus and/or Prohibition from the District Court. In doing so he requested numerous continuances and specifically requested that

the Justice Court not set a new trial date until a ruling had been made. There is no reason to believe that the delay in this case has prejudiced Fitzgerald in any way beyond the length of time he has been facing the pending misdemeanor charge. That length of time is of his own making and was not the fault of the State.

ARGUMENT

FITZGERALD HAS FAILED TO DEMONSTRATE THAT JUDGE ORZECH IS PROCEEDING UNDER A CLEAR MISTAKE OF LAW, RESULTING IN A SUBSTANTIAL INJUSTICE OF AN EMERGENT NATURE, WHICH RENDERS THE USUAL AVENUE OF DIRECT APPEAL AN INADEQUATE REMEDY

Supervisory control is an extraordinary remedy. It is warranted only when the district court is proceeding under a mistake of law, which, if uncorrected, would cause significant injustice for which an appeal is an inadequate remedy. *Park v. Sixth Judicial District Court*, 1998 MT 164, ¶ 13, 289 Mont. 367, 961 P.2d 1267. Whether supervisory control is appropriate is a case-by-case decision that depends on the presence of emergency circumstances and a particular need to prevent an injustice from occurring. *Id.*

This Court has rejected the notion that speedy trial issues may be reviewed on supervisory control by noting the defendant's speedy trial claim was properly reviewed on direct appeal as opposed to supervisory control. *See, State v. Wolfe*, 250 Mont. 400, 821 P.2d 339, 342, (1991) In *State ex rel. Forsyth v. District Court*, 216 Mont. 480, 701 P.2d 1346 (1985), this Court observed:

> Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial – when prejudice can be better gauged – would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal and final rejection by the trial court of the defendant's contention . . . 216 Mont. at 497-98, 701 P.2d at 1537. Moreover, an acquittal would obviate the need for appellate review of a speedy trial claim. *Id.* Accordingly, no emergency circumstances exist which warrant pretrial review of a speedy trial claim by the appellate court exercising its original jurisdiction.

Even if this Court deems it appropriate to review the speedy trial claim put forth by Fitzgerald, his claim fails on the merits.

FITZGERALD'S RIGHT TO A SPEEDY TRIAL HAS NOT BEEN VIOLATED

In this case the six month rule under MCA 46-3-401(2) does not apply because Fitzgerald moved to continue the proceeding, effectively rendering the speedy trial statute inapplicable. *State v. Chesarek*, 1998 MT 15, 953 P.2d 698. Fitzgerald moved for a continuance both on the day of the September 25, 2009, trial and twice more in October, 2009. All of these continuances by Fitzgerald occurred within six months of Fitzgerald being charged. Therefore the remainder of this response will focus solely on the Constitutional speedy trial issue.

The analysis for speedy trial is outlined in *State v. Ariegwe*, 338 Mont. 442, 167 P.3d 815 (2007). The analysis consists of a four part balancing test

that includes the length of delay, reason for the delay, accused's response to the delay, and prejudice to the accused.

I. LENGTH OF DELAY

The first factor to consider is the length of delay. In the instant case the delay is 410 days. The charges were filed on May 25, 2009, and the trial date was set for July 9, 2010, prior to being stayed by this Court.

II. REASON FOR THE DELAY

A. The Original Trial

In the instant case, the original trial date was set for September 25, 2009. Before trial, the court granted the state's motion to file a Second Amended Complaint, as the existing Amended Complaint improperly identified the make and model of the defendant's vehicle and the street location of the stop due to a drafting error. Fitzgerald moved for a continuance because he argued he was unable to proceed under the "new" facts in the Second Amended Complaint. Fitzgerald moved for a continuance of trial to either prepare for trial under the facts in the Second Amended Complaint or for time to seek relief from the District Court, and that motion was properly granted.

B. Petition to District Court

Fitzgerald then filed a "Petition for a Writ of Mandamus and/or Prohibition" in the District Court rather than preparing for a new trial in Justice Court. In fact, he specifically requested that no trial be set. The District Court, in its May 5, 2010 Opinion and Order found that while the amendments to the complaint were indeed substantive, the proper statutory remedy was to postpone the trial for at least five days, the remedy provided by the Justice Court. None of the extra-ordinary writs sought by Fitzgerald were available as the Justice Court provided Fitzgerald with a plain, speedy, and adequate remedy.

C. Status Hearings in Justice Court

While the matter was pending in District Court, the Justice Court ordered regular status hearings from October 2009 through May 2010. Most of these hearings were continued or vacated by request of Fitzgerald. The State did not request any of the delays. The Justice Court properly charged the continuance from the September 25, 2009, vacated trial to Fitzgerald. A status hearing scheduled for October 6, 2009, was continued by Fitzgerald because his counsel had to be in Hamilton for a family matter. A new hearing was set for October 8, 2009, but that was also continued by Fitzgerald. At that time his counsel also advised that he would be unavailable from October 11 through 18 and from November 1 through 10.

A hearing was therefore set for October 30, 2009, but that hearing was vacated at Fitzgerald's request and reset for November 12, 2009 so that his counsel could attend a soccer game.

Fitzgerald filed his Writ of Mandamus with the District Court on October 23, 2009. The State filed a response in District Court October 28. On November 11, 2009, Fitzgerald requested additional time to submit a reply because of the Thanksgiving holiday. The status conference set for November 12, 2009, in Justice Court was also reset for November 24 at the request of Fitzgerald, who also advised that his counsel would be unavailable November 13, 17, 25, 27 and December 2, 10, and 11. Fitzgerald then moved to continue the November 24, 2009, hearing. The State raised a concern about speedy trial at that time. Fitzgerald indicated that he did not want to move forward with setting a new trial in Justice Court while the motion was still pending in District Court. The November hearing was thus reset for December 24, 2009 and the Judge ordered regular written status reports to be submitted monthly by both parties.

E. Status Reports

The State filed a status report on December 21, 2009 stating that it was waiting to proceed with its case against Fitzgerald in Justice Court until the Fitzgerald's District Court motion had been resolved. The next status

hearing was set for January 26, 2010. No report was filed and neither Fitzgerald nor his counsel appeared. The Court requested a report and set another status hearing for February 26, 2010. The State accordingly filed a report on January 27, 2010 explaining that it was waiting to proceed with its case in Justice Court until the Fitzgerald's District Court motion was resolved. On February 23, Fitzgerald moved for a continuance because he was still waiting for a District Court Opinion and his counsel planned to be in Thompson Falls that day. Another status hearing was set for April 22, 2010. Fitzgerald's counsel advised that he would be on a mountain biking vacation in Moab, Utah during that week and the matter was reset. On May 4, 2010, the District Court issued its Opinion and Order denying Fitzgerald's request for mandamus and/or prohibition. Fitzgerald's counsel advised that he would be on vacation in Europe from May 12 to May 31. On May 17, Fitzgerald filed a motion to amend/alter the District Court ruling. That same day, he filed a Motion to Dismiss for lack of speedy trial in Justice Court.

This case was originally set for trial on September 25, 2009, four months after the Fitzgerald's arrest. The State was prepared to proceed on that date, and would have been prepared to proceed at any time following the continuance granted to Fitzgerald. The State has promptly filed timely

responses to all of Fitzgerald's motions in both Justice Court and District Court.

F. Summary of Delays

The delay between Fitzgerald's initial appearance in Justice Court and the original trial setting should properly be attributed to the State. That totals 123 days. There are 222 days, from the day Fitzgerald moved to continue the trial in Justice Court and gave notice of its intention to file a motion in District Court (September 25, 2009) until the day the District Court opinion was handed down (May 5, 2010). That time should properly be charged to Fitzgerald, as the decision to file the motion and wait for a District Court ruling rather than prepare for a new trial in Justice Court was his alone. The State then prepared to proceed with trial in Justice Court once Fitzgerald's counsel returned from vacation on May 31, 2010. Trial was set for June 2, 2010, and then vacated and reset for July 9, 2010 following receipt of Fitzgerald's motions to dismiss in Justice Court and to amend/alter in District Court. When the time between charging (May 25, 2009) and trial (September 25, 2009) and the time between the District Court Order (May 5, 2010) and the new trial (July 9, 2010) less the time after the Order while a new Justice Court trial could not be scheduled because of Fitzgerald's

counsel's European vacation (May 12 through May 31, 2010) is totaled, it sums to 162 days charged to the State.

Under the "reason for delay" prong of the *Ariegwe* analysis, the Fitzgerald's decision to seek a Writ in District Court and the repeated continuances required to accommodate Fitzgerald's counsel's schedule clearly outweigh the time charged to the State.

III. ACCUSED'S RESPONSE TO THE DELAY

The Court in *Ariegwe* considered the defendant's actions in response to the delay. The Court looked at the timing of the speedy trial motion and noted it was made on the 373rd day of delay. *Id.* at 496, 167 P.3d at 855. The Court found that he had a desire to be brought to trial that weighed slightly in defendant's favor, but the court accorded this factor little weight in the overall balancing. *Id.* at 498, 167 P.3d at 856.

Throughout the disposition of the procedurally convoluted matter now before the Court, Fitzgerald has repeatedly requested to vacate or continue scheduled hearings and updates. Fitzgerald did not complain about the delay in the instant case until the 342nd day of delay, May 17, 2010. Furthermore, he specifically requested that a trial not be set until after a District Court ruling on his Writ.

IV. PREJUDICE TO THE ACCUSED

Speedy trial guarantee serves to shorten the disruption in life caused by arrest and the presence of unresolved criminal charges, not to eliminate the disruption altogether. *Id.* at 499, 167 P.3d at 857. The Court acknowledges that there is some inherent anxiety associated with being charged with a crime, and also considers the length of pretrial incarceration and the possibility that the accused's ability to present an effective defense will be impaired by the passage of time. *State v. Morrisey*, 214 P. 3d 708, 2009 MT 201.

In the instant case, Fitzgerald has not been incarcerated during the pendency of this case. He immediately posted bail on the morning of his arrest. He has not since been incarcerated following his release. The passage of time has not hindered his ability to present an effective defense. All witnesses are available for trial and have been for the duration of this proceeding. The witnesses that have been interviewed have not had a problem with memory of the events. All are quite clear. His life was not altered in any way by the pending charges other than that he has made occasional court appearances to request continuances.

V. BALANCING

The final step in the new analysis is to balance the length of delay, the cause and culpability for the delay, the totality of the accused's response to the

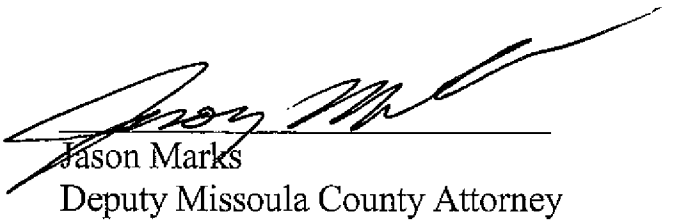
delay, the strength of the presumption of prejudice and the strength of prejudice to the accused. While a significant portion of the delay in this case, specifically the time between Fitzgerald's initial appearance and his first trial setting is attributable to the State as institutional delay, the majority of the delay was in no way caused by action or inaction on the part of the State. Fitzgerald chose to seek a Writ in District Court rather than face a timely trial. He repeatedly asked for and was granted continuances. Fitzgerald did not file a motion to dismiss for lack of speedy trial until over a year after the alleged DUI occurred. At no prior point had he voiced any concern about speedy trial. There is no indication that Fitzgerald's defense has been prejudiced by the delay as the only two witnesses to Fitzgerald's driving are two Missoula County Sheriff's Deputies are both available and prepared to testify should this case ever get to trial.

On balance, Fitzgerald's right to a speedy trial has not been violated. He cannot both seek to cause extensive delay and then have his case dismissed because of that delay.

CONCLUSION

Based on the foregoing Response, the Petition for Write of Supervisory Control should be denied.

DATED this 16th day of July, 2010.



Jason Marks
Deputy Missoula County Attorney

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the above to:

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(via Courthouse mail)

The Honorable Karen A. Orzech
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Missoula, MT 59802
(Hand delivered)

Dated: 7/16/10 Jason Marks

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

Jason Marks

APPENDIX

EXHIBIT 1

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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

JOHN FITZGERALD,

Petitioner,

-vs-

JUSTICE COURT OF MISSOULA COUNTY, MONTANA DEPT #2 HON. KAREN A. ORZECH,

Respondent.

Cause No. DV-09-1223

Dept. No. 1 ED McLEAN

PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

Comes now John Fitzgerald and petitions the District Court to enter a writ of mandamus and/or a writ of prohibition to the Justice Court of Missoula, Honorable Justice Karen Orzech presiding. This petition is based on the law and argument set forth below and the affidavit of John Fitzgerald, filed herewith in support.

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS IN THE JUSTICE COURT OF MISSOULA COUNTY, HON. JUSTICE ORZECH PRESIDING

On or about May 20, 2009, John Fitzgerald appeared and pled not guilty to a second offense charge of DUI and driving without headlights in Missoula Justice Court, Hon. K. Orzech presiding. After the omni hearing on July 17, 2009, the State filed an amended complaint which was likewise signed by Judge Orzech on August 21, 2009. This complaint alleged that the Defendant was driving a Camaro on Third Street while committing the

alleged offenses and alleged the DUI as a first offense. Defendant pled not guilty to the amended charge on September 24, 2009. Trial was set on September 25, 2009.

Also on September 24, 2009, Fitzgerald filed a motion in limine and a motion to dismiss which in essence said that there was no evidence that he was in a Chevrolet Camaro or on Third Street and that since there was no such evidence, a directed verdict for the Defense was required. On the morning of trial, the State moved in chambers to amend the complaint (again) to allege that Defendant was driving a white van on Reserve and Mullan while DUI and driving without headlights. Defendant objected to the late amendment arguing that the trial day amendment was one of substance and not of form and that it was inappropriate to allow a late amendment. Judge Orzech ruled that the amendment was one of form and not of substance and that Defendant was not prejudiced by the late amendment and granted the leave to amend the complaint. Defendant objected and then pled not guilty to the second amended charge of DUI and pled guilty to the second amended charge of driving without headlights. (A video in evidence shows Defendant exiting a brightly lit commercial business and being picked up by a Sheriff after driving 50 to 100 yards into the intersection of Reserve and Mullan Road, near the Super Walmart in Missoula.)

Defendant then noted that he had prepared for the defense to show that he had an alibi and was nowhere near Third Street in a Camaro, at the time of the alleged offense. In the alternative to going forward unprepared for the second amended charge, Fitzgerald requested a continuance to seek appropriate relief from this Court before trial or to prepare for trial on the second amended charge. The State conceded the continuance was appropriate and Judge Orzech, with reservations, then granted the

continuance and dismissed the jury from further service.

Fitzgerald seeks a writ of mandamus and/or a writ of prohibition or other appropriate relief, ordering the Justice Court to rescind its order allowing the amendment and granting such other further relief as may be appropriate including the granting of the motion in limine or dismissal.

STANDARD OF REVIEW

The issuance or denial of a writ of mandamus or a writ of prohibition calls for a conclusion of law which the Supreme Court reviews to determine if it is correct. **Franchi v. Jefferson County (1995), 274 Mont. 272, 275, 908 P.2d 210 ,212**; The standard of review in this matter would be to determine whether as a matter of law, based on the written pleadings, was Justice Orzech compelled to deny the request to file a second amended complaint and then to grant Defendant's motion in limine?

LAW AND ARGUMENT

The law on these issues is patently clear and mandatory. Due process of law is precious and is guaranteed by Article II, Section 17 of the Montana Constitution as well as the Fourteenth Amendment to the US Constitution. The foundation of the guarantee of due process is fairness. **Gagnon v. Scarpelli (1973), 411 U.S. 778, 782, 93 S. Ct. 1756, 1760, 36 L. Ed.2d 656.**

MONTANA LAW PROHIBITS AMENDMENTS WITHIN 5 DAYS OF TRIAL

MCA 46-11-205 *States amending information as to substance or form.*

> *(1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the information.*
>
> *(2) If the court grants leave to amend the information, the*

defendant must be arraigned on the amended information without unreasonable delay and must be given a reasonable period of time to prepare for trial on the amended information.

(3) The court may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. ***(Emphasis added)***

This Court should declare that the most adequate and appropriate remedy for improper amendment is to issue an order requiring Justice Orzech to rescind her order allowing the untimely amendment. Defendant requests a writ of mandamus compelling her to rescind her order or other writ of supervisory control as is necessary to give justice. A writ of prohibition might be used to prohibit Justice Orzech from allowing the amendment. A writ of mandamus could compel her to grant Fitzgerald's motion in limine.

This Court has original jurisdiction of such requests and may make such orders in chambers. See **MCA 3-5-301 to 311.** The time for issuing such an order is still ripe. Issuing the order will result in a reaffirmation of the rights of Defendant and will avoid him having to undergo a second trial on an improper charge. A writ of mandamus and the writ of prohibition are two sides of the same legal coin; the writ of prohibition is the counterpart of the writ of mandamus. **Kimble Properties v. Dept. of State Lands (1988), 231 Mont. 54,56,750 P.2d 1095, 1096.** Generally, the purpose of a writ of mandamus is to compel a certain action, while the purpose of a writ of prohibition is to bar the performance of a certain action. **Goyen v. City of Troy (1996), 276 Mont. 213,223,915 P.2d 824,830 (citing Awareness Group v. Board of Trustees of School Dist. No. 4 (1990), 243 Mont. 469,475,795 P.2d 447,451).** Both the writ of mandamus and the writ of prohibition are governed by statute. The mandamus statute is as follows:

***MCA 27-26-102**. When and by whom issued.*

(1) A writ of mandamus may be issued by the Supreme Court ... to any lower tribunal, corporation, board, or person to compel the performance of an act that the law specially enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by the lower tribunal, corporation, board, or person.

(2) The writ must be issued in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Emphasis Added)

*Similarly, **MCA 27-27-102**, provides:*

A writ of prohibition may be issued by the supreme court or the district court or any district judge to any lower tribunal or to a corporation, board, or person in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law. The writ is issued upon an affidavit on the application of the person beneficially interested.

The above statutes have been interpreted to mean that a writ is available when the party who requests it is entitled to the performance of a clear legal duty, and where there is no speedy and adequate remedy in the course of law. **Franchi, 908 P.2d at 212 (citing State ex rel. Cobbs v. Dept. of Social and Rehabilitative Services (1995), 274 Mont. 157,906 P.2d 204)**

Ordinarily mandamus will not lie to compel the performance of a discretionary function. **[State ex rel. Butte Youth Service Center Murray (19761,170 14ont. 171, 551 P.2d 1017, 33 St. Rep. 610.]** However, if there has been such an abuse of discretion as to amount to no exercise of discretion at all, mandamus will lie to compel the proper exercise of powers granted. **Barnes v. Town of Belgrade (1974),164 Mont. 467, 524 P.2d 1112.**

It cannot be reasonably argued that the Defendant had a speedy or adequate remedy to Justice Orzech's decision allowing the amendment of

the charge on the morning of trial. Even if the amendment could be considered being one of form only, Defendant was still prejudiced by the amendment as to form since he was guilty of the second amended charge of driving a van without headlights on or near Mullan and Reserve. Pleading guilty is most certainly an act which constitutes prejudice. Thus, whether the second amendment was of form or substance does not change the fact that Montana law prohibits such amendments where a Defendant is prejudiced. Form or substance makes no difference; the amendment was prohibited by law.

A defendant who is aggrieved by a faulty decision or error at Justice Court normally has one form of relief ... a trial de novo in District Court. This rule, however, can be counter-productive where the Justice Court or prosecution intentionally commits error in order to get a second bite at the apple or to provide a soft landing for the prosecution. Here, the State clearly erred in the language content of its first amended complaint. The sole question under the controlling statute is whether the change (allowing the State to charge Fitzgerald with driving another vehicle in another location) is one of substance or of form. If it is a substantial change, it cannot be granted unless it is made more than five days before trial and is supported by an appropriate affidavit.

If it is one of form only, it can be made right up until the jury reaches its verdict. But if the defendant was prejudiced by the late amendment, as to form in having to ask for a continuance or in having to plead guilty, an amendment may not be granted. Here the Justice Court looked outside the statute to find reasons to allow the amendment in a manner that would allow the trial to go forward rather than invoke a dismissal or an obvious loss by the State. Had the charge not been amended, the State had no evidence to prove the crime alleged in its first amended complaint. The

Court ruled that because Defendant knew the State had made an error in its first amended complaint, that it would cause no prejudice if the Defendant was tried on the second amended charge. No basis for considering the "knowledge by a Defendant" can be found in the statute. The sole question under the statute is whether the amendment is one of substance or form. If it is of substance, it was made too late. The calendar tells us that.

Words are construed in their ordinary sense and meaning. "Substantial" means something material or something that is significant. When a crime is committed, it seems fundamental that where it is committed and how it is committed are substantial aspects of the charge. If the amendments trigger a change of plea, it is inconceivable to this writer how the second amendment could not be seen as substantial. If the trial over the first charge would result in no evidence being heard and the trial over the second amendment result in a prima facie case being made out by the State, then of course the change is substantial. While the State would argue that there should be some unwritten basis not found in the Statute for allowing an otherwise untimely amendment; to do so would be legislation by the Court. The Defendant having notice that a mistake was committed is no more a compelling reason to ignore the law than knowing the Defendant is guilty of possession of drugs is a basis for allowing an unlawful search to have uncovered the marijuana in the basement.

Another reason that might be argued against intervening in a Justice Court matter is that there is no record and the Court normally can't examine the facts without a transcript or a record before it. However, this is not such a situation. Every material fact or aspect of this dispute is in writing and it is easily discerned from written pleadings in the file. There can be no oral dispute over what the written word and pleading said or did

or when it was done. This amendment clearly was made and granted on the morning of a jury trial and it involved changing the how and where of the alleged charge. This court has the clear opportunity to reinforce the administration of justice in a timely manner by stepping in. If the "no record" argument was an appropriate basis for not intervening, then the mandamus statute does not apply and the intervention and correction of a Justice Court would never happen. This would not give life or meaning to the rules requiring procedures in those courts. Justice Court could and would disregard their legal duties with impunity.

The rules of due process are made to protect the Defendant and are guaranteed by the Constitution. They are of the highest importance. The statute says nothing about Defendant's knowledge or correcting an obvious mistake being an element of the consideration by the Court. It says that substantive changes cannot be made within 5 days of trial. End of story.

To allow the Justice Court to insert an otherwise non-existent basis for allowing a substantive amendment on the morning of trial is no more allowable than allowing the State to introduce evidence from the fruit of the poisonous tree because they found the smoking gun, albeit in the entirely wrong way.

A comment is necessary about the question of whether to intervene in a Justice Court matter at all since the errata there can always be corrected by a second trial de novo in District Court. It is argued that in this case, in this situation, ignoring intervention is not an adequate remedy. It seems to this writer that much if not most of the Justice handed out in Montana is done in the Justice Court. The State opts to file most of its charges there. It is the first line of defense to a backlogged District Court system. Thus, for the common man this is the first and often the only

source of Justice they see and often the only source of justice they can afford. Two trials are an insufficient substitute for one good one. To defer to act will only imply that this can be done again and that the higher courts are too busy to bother with making sure that Justice Courts follow the rules. It will also create more work for the District Courts and more panels of juries selected from our citizenry. Finally, it may create more work eventually in this court when litigants argue that the trial de novo, is not an adequate remedy upon appeal.

Next, it is argued that a Defendant has a second basis for alleging that he should not be forced to prepare for one trial on one set of facts and then at the last moment, be forced to prepare again on another set of facts the morning of trial. To require the Defendant to undergo a second trial at this juncture, while knowing that we can still right the wrongs committed before the first trial, is a measure of the value we place on the rights of due process and the pursuit of happiness and to retain our property. To make a citizen pay his privately retained counsel more because of State error is not an appropriate remedy.

As to the good that can come from issuing a supervisory order... it will reinforce the basic rule and not authorize a departure from common sense just to protect the State from their own error. It will ensure that charging documents are carefully prepared in light of the underlying evidence. Finally, it will insure that justice is done in Justice Court where much justice is already done, and should be done. An order reinforcing the basic common sense application of common sense words and clearly limiting language of **MCA 46-11-205** will be seen by each and every justice court and District Attorneys. If this Court does not insure that proper trials are taking place at every level, then it is going to reinforce the concept that these lower levels of justice don't matter. They do matter. Montana has

rules for these courts and it has rules for this court. Ordering a Justice Court to comply with the simple application of a simple statute, will do far more for justice that bending the rules to cover up an obvious error. Defendant's knowledge of a substantive flaw in State drafted pleadings is not a statutory basis for an untimely amendment. This court consistently denies appeals on what might be meritorious grounds because errors were made in preserving the record at the lower level. This is no different in its concept. The State should be held to follow the rules its legislators drafted.

CONCLUSION

This court should not ignore the simple application and interpretation of the amendment statutes and should order the Court to not allow the late amendment.

DATED this 8th day of October, 2009.

SKELTON & COOLEY

Paul Neal Cooley
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2009, I hand-delivered a copy of the proceeding document, upon the following:

Missoula County Attorney
Missoula County Attorney's Office
200 West Broadway
Missoula, Montana 59802

EXHIBIT 2

Ed McLean, District Judge
Department No. 1
Fourth Judicial District
Missoula County Courthouse
Missoula, Montana 59802
Telephone: (406) 258-4771

FILED MAY 04 2010
SHIRLEY E. FAUST, CLERK
By _____ Deputy

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

JOHN FITZGERALD, Petitioner, -vs- JUSTICE COURT OF MISSOULA COUNTY, MONTANA DEPT. #2 HON. KAREN A ORZECH, Respondent.	DEPT. 1 CAUSE NO. DV-09-1223 OPINION AND ORDER

Pending before the Court is John Fitzgerald's *Petition for a Writ of Mandamus and/or Prohibition* which alleges that Justice Court Judge Karen Orzech erred when she allowed the State of Montana to amend the first amended complaint on the day of trial to allege that on May 20, 2009 at approximately 1:30 a.m., the Defendant was driving a white van on Reserve and Mullan roads while driving under the influence of alcohol and while driving without headlights. The first amended complaint going into the trial alleged the Defendant was driving a white Chevrolet Camaro on Third Street while driving under the influence of alcohol and while driving without headlights. An evidence video shows Defendant exiting a brightly lit

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commercial business in a white van with its lights off and being stopped by a Sheriff's deputy after driving 50 to 100 yards into the intersection of Reserve Street and Mullan Road, near the Super Walmart in Missoula. The Defendant intended to rely on the video to establish an alibi that he was nowhere near Third Street in a white Camaro at the time alleged in the first amended complaint. While the Defendant admits he was driving without head lights at Reserve and Mullan roads, he denies being under the influence of alcohol at either location.

The State argued that the State's requested amendment of the first amended complaint at trial was one of form and not substance, while the Defendant argued the State's amendment was one of substance and that he was prejudiced in his ability to defend against the change of critical facts on the day of trial. The Defendant requested a continuance in Justice Court to either seek relief from this Court before trial or to prepare for trial on the second amended complaint. The State responds that the Defendant knew the State's intended alleged facts as evidenced by his pleading of guilty for driving the van with the lights off at the intersection of Reserve and Mullan roads. Incredibly, the State explains that the State's allegation of the wrong set of facts in the original and first amended complaints were nothing more than a clerical error.

The Justice Court granted the State's motion to amend the first

amended complaint and granted the Defendant's motion to continue the trial and dismissed the Justice Court jury from further service.

This Court agrees with the Defendant that changing critical facts at the last minute was a matter of substance, triggering MCA § 46-11-205, which allows a criminal complaint to be amended in matters of substance at any time, *but not less than 5 days before trial*. Therefore, the Justice Court correctly continued the trial to allow the Defendant time to prepare for a defense on the corrected alleged material facts.

Defendant chose instead to file his *Petition for a Writ of Mandamus and/or Prohibition* with this Court which argues that by allowing the State to amend the first amended complaint to allege the new material facts, the Justice Court took away his intended "alibi" defense and therefore he has no plain, speedy, and adequate remedy in the ordinary course of law other than to file a writ seeking dismissal of the charge of DUI against him under any set of facts. MCA §§ 27-26-102 and 27-27-102.

Why the Defendant chose to file a writ seeking mandamus and/or prohibition is not entirely clear, as those provisions are intended to compel a government official or board or a corporate official or board to perform or to refrain from performing an act inconsistent with the official's or board's legal duties. In this case, the Justice Court did not have a duty to deny amendment of the first amended complaint, and the appropriate writ would

have sought this Court's supervisory control over a lower tribunal based on the allegation that the Justice Court abused its discretion by allowing the amendment and not dismissing the case because the amendment prejudiced him by taking away his "alibi" defense. As this Court has concluded that none of the extraordinary writs of mandamus, prohibition, or supervisory control are available remedies to the Defendant because they all require "no plain, speedy, and adequate remedy in the ordinary course of law," the distinctions between the three are not critical to the outcome of the Defendant's petition.

While the Court agrees with the Defendant that amending a criminal complaint changing all the critical facts upon which the charges are based are substantive in nature, the Court does not agree that Defendant had no plain, speedy, and adequate remedy in the ordinary course of law. MCA §§ 27-26-102 and 27-27-102. And in fact, the Justice Court provided the Defendant with a plain, speedy, and adequate remedy by postponing the trial for at least five days as required under the law. Therefore, the Defendant's remedies are a trial on the correct set of facts and the right to appeal after the Justice Court trial. Thus, none of the extra-ordinary writs are available to the Defendant.

Also, this Court finds no legal support for the Defendant's incredulous contention that he somehow has a due process right to litigate his "alibi"

defense under the incorrect fact scenario stated in the State's original and first amended complaints which entitles the Petitioner/Defendant to have this Court order the Justice Court to deny the filing of the second amended complaint and dismiss the DUI charges against him.

Therefore, IT IS HEREBY ORDERED that the Petitioner/Defendant's *Petition for a Writ of Mandamus and/or Prohibition* [and/or Writ for Supervisory Control] is DENIED, and this case is returned to the Justice Court for trial.

Because the Defendant filed a Writ before this Court, making it impossible for the Justice Court to try the case within six months, this Court further orders that for purposes of speedy trial in the Justice Court under the six-month rule governing trial on misdemeanor offenses, the Justice Court action shall be treated as "stayed" from October 8, 2009 when the Writ was filed with this Court through the date of this dispositional Opinion and Order.

SO ORDERED and DATED this 4th day of May, 2010.

ED McLEAN, District Judge

cc: Paul Cooley, Esq.
Missoula County Attorney's Office

EXHIBIT 3

Honorable Karen A. Orzech
Justice Court II
200 West Broadway
Missoula, Montana 59802
406.258.3328

IN THE JUSTICE COURT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF MISSOULA,
BEFORE THE HONORABLE KAREN A. ORZECH, JUSTICE OF THE PEACE

STATE of MONTANA,
Plaintiff,

vs.

JOHN FITZGERALD,
Defendant.

Case No. : TK-2009-37241-T2

ORDER and
JURY TRIAL SCHEDULE

The Court received the Defendant's reply brief today. On September 25, 2010 the State was allowed to file an amended complaint. To this amended complaint the Defendant pled guilty to the violation of Montana Code Annotated Section 61-9-201, failure to have headlights lighted when required, and not guilty to the violation of MCA Section 61-8-401, driving under the influence of alcohol and/or drugs. The Court reviewed the briefs on the Motion to Dismiss for lack of a speedy trial and finds the delay is caused by the defense. The Motion to Dismiss for the lack of speedy trial is denied.

The jury trial is set for July 9, 2010 at 8:15 AM. The update for the trial is July 2, 2010 at 3:00 PM. The state, defense attorney and defendant must be present at that time.

23rd June 2010
Entered

Karen A. Orzech
Justice of the Peace

Cc: Jessica DeMarois
County Law Intern

Paul Neal Cooley, Esq.
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